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SUPREME COURT, U. S. Nos. 410 and 386

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 410

CHICAGO & EASTERN ILLINOIS RAILROAD, et al.,
Appellants,

v.

CITY OF CHICAGO, et al.,
Appellees.

No. 386

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

CITY OF CHICAGO, et al.,
Appellees.

On Appeal From The United States District Court for the Northern District of Illinois.

BRIEF OF THE CHICAGO & EASTERN ILLINOIS RAILROAD IN OPPOSITION TO THE MOTION TO AFFIRM

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Appellant, Chicago & Eastern Illinois Railroad Company ("C&EI"), submits this brief in opposition to the motion to affirm filed by appellees.

The Railroad Is Entitled To Defend The Commission Order Authorizing Discontinuance Of Trains 93 And 54.

Appellees, in two footnotes (Motion to Affirm, pp. 2, 11), challenge the C&EI's right to participate in this proceeding on the ground that the Chicago-Evansville line was sold to the Louisville & Nashville Railroad ("L&N") on June 5, 1969. This argument is without merit.

Appellees do not dispute the fact that the trains at issue on this appeal were operated by the C&EI between Chicago, Illinois and Evansville, Indiana until their discontinuance, pursuant to the Commission Order, on February 2, 1968. Appellees themselves joined the C&EI as a party-defendant when they began the action for judicial review which is now before this Court on appeal. Appellees never made any motion in the District Court to dismiss C&EI as a party.

Certainly the railroad, having secured an order of the Commission favorable to its position, has continued standing to defend that order throughout any proceedings for judicial review. In any event, even if it were conceded that all interest in the subject matter of the litigation had been transferred from the C&EI to the L&N, C&EI would nevertheless properly maintain this action under Rule 25(c) of the Federal Rules of Civil Procedure.

Appellees' Motion To Affirm Itself Demonstrates That The Questions Presented For Review Are Substantial.

While appellees' motion to affirm asserts, in purported compliance with this Court's Rules, that the questions presented for review are insubstantial, the admissions necessarily made in the motion itself demonstrate that the issues deserve this Court's plenary consideration.

Thus, appellees concede that the District Court's decision rests upon an interpretation of Section 13(a)(1) of the Interstate Commerce Act (49 U.S.C. §13(a)(1)), which is directly contrary to the interpretation adopted by the Commission. The motion also concedes that there exist only two court decisions on this issue, both of which are now before this Court on appeal (Motion, pp. 7-8). Appellees also seem to agree with appellants that the question of statutory interpretation involved in this appeal has a general importance in train discontinuance cases. These facts alone indicate the desirability of plenary consideration of the appeal by this Court.

Further argument concerning the merits of the issue of statutory construction of Section 13(a)(1) would be inappropriate here. In any event, nothing in the motion to affirm answers the serious defects of the District Court's decision which were discussed in the jurisdictional statement: the District Court's vacation of a Commission Order without a hearing on the merits; that Court's voiding of a Commission Order on grounds of inadequate notice, despite a lack of showing of prejudice; and the Court's complete failure to prescribe standards with respect to notice, to guide future proceedings in this case or proceedings in future discontinuance cases.

Indeed, the lack of any adequate or specific standards regarding notice, either in appellees' argument or in the decision of the District Court, is underscored by the contrast between the position taken by the appellees in the District Court and that indicated in the motion to affirm. In the District Court, appellees argued that notice should have been given on the L&N line between Evansville and Atlanta (Memorandum In Support of Motion for Summary Judgment, pp. 6, 9). In their motion to affirm, however, appellees apparently construe the District Court's decision to require notice not only between Evansville and Atlanta, but also on the "Hummingbird" route between Cincinnati and New Orleans and adopt that decision as correct.

For the reasons stated herein and in the jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted,

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